BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAID ABDI	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,032,374
TYSON FRESH MEATS INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant appeals the October 28, 2009, Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was denied an award for a permanent partial general disability or a functional impairment after the ALJ determined that claimant had suffered only temporary injuries on August 22, 2006. The ALJ did find that claimant was entitled to the payment of outstanding medical bills related to the treatment of his low back injury and unauthorized medical not to exceed $500.00, but denied any future medical treatment due to the temporary nature of the injuries resulting from the accident.

Claimant appeared by his attorney, Beth R. Foerster of Topeka, Kansas. Respondent appeared by its attorney, Carolyn McCarthy of Kansas City, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on February 2, 2010.

ISSUES

1. What is the nature and extent of claimant's injuries and disability from the accident on August 22, 2006? Claimant alleges that he suffered a 5 percent permanent functional impairment to his low back and is entitled to a permanent partial general disability (work disability) under K.S.A. 44-510e. Claimant further contends that, even without a permanent functional impairment, he is still entitled to a work disability under *McLaughlin.*[1] Respondent contends that claimant's back complaints are either the result of kidney stones, for which claimant has been treated numerous times in the past, or are the result of injuries claimant suffered while working for other employers after being terminated from respondent for attendance problems.

[1] *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348 (1989).

Finally, respondent contends that claimant's injuries from the alleged accident, if related to his job with respondent, were temporary at best.

2. Is claimant entitled to future medical treatment for the injuries suffered on August 22, 2006? Respondent argues that, even if the accident is compensable, future medical treatment should be denied because claimant's injuries were temporary and because claimant suffered a subsequent non-work-related injury to his back.

FINDINGS OF FACT

Claimant, who is originally from Somalia, began working for respondent in its Norfolk, Nebraska plant on June 6, 2005, in a job identified as "bone loin wings". This job involved working with a hook and knife. Claimant was in a car wreck in October 2005 and missed about two weeks of work. When claimant returned to work, he was moved to cleaning. The automobile accident caused claimant to suffer pain in his left arm and neck, but not in his back. In April 2006, claimant transferred to respondent's Finney County plant, where he again worked "bone loin wings". While in Finney County, claimant began having back pain. He missed work from May 26 through May 31, 2006, for kidney stones and again from July 6 through July 12, 2006, for problems initially believed to be kidney stones but later determined to be a back strain. Claimant denied any back pain before July 6, 2006.

After returning to work in July 2006, claimant was given both verbal and written warnings about improving his work production. Claimant was also advised that he was in violation of respondent's attendance policy. Claimant was on vacation from July 22, 2006, through July 29, 2006, and then missed work on August 2, 15, 17, 18 and 21, 2006, and from August 23 through August 31, 2006. If an employee accumulates 14 points, he or she is subject to termination. One point is assessed for being tardy more than two hours and three points are assessed for a no call/no show. On September 1, 2006, claimant was terminated, having accumulated 21 points due to attendance problems. During the process, several disciplinary action reports were prepared and presented to claimant, which he refused to sign. Claimant met with Mitch Young, respondent's human resource manager, regarding the attendance problems. When claimant met with Mr. Young, he did not advise Mr. Young that any of the entries adding up to the 21 points were actually times when claimant called in to respondent's plant. There was some question in this record as to whether the call-in system was working properly. Mr. Young also acknowledged that at the time of the termination, he was not aware of a document dated August 29, 2006, from Randall K. Cundiff, ARNP, which took claimant off work from August 29 through August 31, 2006. Claimant's actual last day worked with respondent was on August 22, 2006.

Claimant was referred to urologist Ronald Catanese, M.D., on July 11, 2006, for an evaluation of the pain in his left lower quadrant of the abdomen. Claimant had a history of pain for the last five days. Claimant also had a history of kidney stones which had been removed three times in the past. An x-ray showed a 1 to 2 mm stone in the lower part of the left ureter without much obstruction. By July 12, the stone had passed without the need of surgical intervention. The next time Dr. Catanese saw claimant was on August 21, 2006. At this time claimant's pain had returned. A repeat CT scan was negative for stones, and claimant did not have fever or chills indicative of a urological problem. Claimant was diagnosed with chronic back pain. Dr. Catanese was asked whether he had an opinion as to whether the back pain was related to his work. But Dr. Catanese stated that he was not making an opinion. On cross-examination, he agreed that flank pain is probably the most common symptom of kidney stones. Claimant gave him no history of a work injury. Claimant did report that he had not worked for seven days at the time of the examination.

On August 22, 2006, claimant went to a walk-in clinic where he saw Randall K. Cundiff, ARNP. Claimant was diagnosed with post renal calculi and residual back pain with muscle spasm. He was returned to work the following Wednesday without restrictions. Claimant returned to nurse Cundiff on August 29 with chronic back pain. He was again given a release to return to work without restrictions.

After leaving respondent, claimant applied for work with National Beef in Liberal, Kansas. He successfully passed a pre-employment physical and, during the physical, denied any back problems. Claimant worked for National Beef for two to three months. When his back pain came back, he requested a job transfer. When National Beef refused the job transfer, claimant quit his job.

Claimant was sent by his attorney to board certified orthopedic surgeon C. Reiff Brown, M.D., on November 8, 2006. Dr. Brown found localized tenderness at the lumbosacral level, limited range of motion of the lumbar spine and muscle spasm on one examination. Dr. Brown later admitted that the muscle spasm finding was an uncertain finding. Claimant had no flank or abdominal tenderness, his sciatic nerve stress tests were not positive, his reflexes were normal and equal bilaterally, and there was no sensory or motor nerve impairment. Claimant was diagnosed with lumbar sprain resulting from claimant's work activities with respondent. Dr. Brown rated claimant at 5 percent to the whole body pursuant to the fourth edition of the AMA *Guides*[2] noting that claimant fell within the lumbosacral DRE Category II. Dr. Brown found that if claimant's muscle spasms were gone by the time he was evaluated by both Dr. Carabetta and Dr. Stein, then that could indicate some healing of the chronic condition. Dr. Brown was asked to review the task list created by vocational expert Doug Lindahl. He opined that claimant had suffered no loss of task performing abilities from the injuries at respondent.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was referred by the ALJ to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., for an evaluation on March 26, 2007. Dr. Carabetta examined claimant, diagnosing back pain. Claimant presented with subjective complaints, but without objective findings during the examination. Dr. Carabetta noted findings suggestive of considerable symptom magnification. Claimant displayed diffuse tenderness but no muscle spasm. Claimant was referred to physical therapy and, at some point, Dr. Carabetta became the authorized treating physician for claimant. Claimant was referred for physical therapy and showed some subjective improvement with a reduction of his pain. Initially there were to be twelve physical therapy sessions. However, claimant attended only the initial evaluation and five physical therapy sessions. Claimant expressed disinterest in continuing physical therapy, as it was not helping. There was some confusion in this record as to whether claimant stopped going to physical therapy or was uncertain if he was to continue. Claimant advised Dr. Carabetta that he was not interested in any more physical therapy. Dr. Carabetta was provided a task list prepared by Mr. Lindahl. Dr. Carabetta determined that claimant was able to perform all of the tasks on the list. He acknowledged that some tasks may cause claimant some pain, but he was not restricted from performing all of the tasks on the list.

During the examination, Dr. Carabetta noted claimant displayed a marked limp. There was no radiculopathy in claimant's lower extremities, and the doctor was unable to logically explain the limp. It appeared to be out of the ordinary and exaggerated. Additionally, when Dr. Carabetta performed a lumbosacral spine and lower extremity examination, claimant was able to heel-to-toe walk without difficulty, another finding inconsistent with a marked limp. There was also an absence of any paraspinous muscle spasm.

Claimant was again examined by Dr. Carabetta on July 12, 2007. Claimant again expressed no interest in additional physical therapy, but continued to have significant pain complaints. Dr. Carabetta was again unable to identify the source of claimant's pain. There were no objective findings from the evaluation. He determined that claimant had no ratable impairment. Based on his evaluation, claimant had no functional impairment, falling into a lumbosacral category DRE I under the fourth edition of the AMA *Guides*.[3] Initially, Dr. Carabetta was uncertain as to whether claimant was a category I or II under the DRE, but after the final evaluation, and after considering the examination information from Dr. Stein, he determined category DRE I was proper.

Claimant was referred by his attorney to board certified neurological surgeon Paul S. Stein, M.D., for an evaluation on April 17, 2008. Dr. Stein was unable to identify a specific injury under the AMA *Guides*. There was no muscle spasm or guarding, only mild to moderate tenderness and subjective restriction of motion. He found insufficient evidence to support a diagnosis of a permanent injury to claimant's back from his work activities. He

[3] AMA *Guides* (4th ed.).

acknowledged that past medical records indicated muscle spasm, but found none during his evaluation of claimant. Dr. Stein also failed to find evidence of atrophy during the examination. Claimant was placed in a DRE Lumbosacral Category I with a zero percent impairment under the fourth edition of the AMA *Guides*.[4] If claimant had suffered a muscular-ligamentous strain from repetitive work activities, Dr. Stein would have expected that type of strain to be considerably better by the time of the examination. Dr. Stein also determined that claimant was able to perform all of the tasks on Mr. Lindahl's task list.

In June 2008, claimant moved to Minnesota to be near a larger population of people from his country. Claimant worked for a plastic bag company called Stevens for about two weeks. Claimant was hired through a temporary agency. After working for about two weeks, the temporary company terminated his contract. At the time of the regular hearing, claimant remained unemployed. While in Minnesota, claimant again started taking physical therapy, this time with the Health Partners Clinic and Katherine P. Sufka, PT. The physical therapy began in November 2008 and continued through January 26, 2009, with seven visits, two cancellations and two no shows. The office note from Robert H. Carlson, PA, of Health Partners, dated September 10, 2008, described symptoms much worse than described during any of the examinations by Dr. Stein, Dr. Brown or Dr. Carabetta. Claimant displayed sciatica in both legs reaching to the knee, calf, heel and sometimes all the way to the toes. Claimant had paresthesia in both thighs and pain radiating into his testicles. Claimant also complained of feeling a bulge in his low back with continued pain below the knee. Claimant lacked the coordination to heel-and-toe walk. While claimant initially displayed radiculopathy bilaterally, by the November 11, 2008, session, the radiculopathy appeared to be concentrated in the left lower extremity. Claimant was discharged from physical therapy in January 2009, but continued to display low back pain with referred pain below the knee on the left side.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

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[4] AMA *Guides* (4th ed.).

[5] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[8]

It is not disputed that claimant suffered accidental injuries while working for respondent. Claimant's job was highly repetitious and very fast. The constant bending and twisting caused pain in claimant's low back. The dispute centers around the permanency associated with that series of injuries. Dr. Brown found that claimant had a 5 percent permanent partial whole body impairment from his work activities, but acknowledged that muscle spasm found during his examination of claimant was questionable, and both Dr. Stein and Dr. Carabetta later failed to find that muscle spasm. Neither Dr. Stein nor Dr. Carabetta found claimant to have any permanent impairment from his work with respondent. The ALJ determined that claimant had failed to prove that he suffered permanent injuries from his work with respondent. The Board agrees with the findings of the ALJ. Claimant has failed to prove that he suffered a permanent impairment from the work he performed for respondent.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[9]

Claimant argues that he would still be entitled to a permanent partial general (work) disability under K.S.A. 44-510e, based on the Kansas Court of Appeals decision in

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[7] K.S.A. 2006 Supp. 44-501(a).

[8] K.S.A. 44-510e(a).

[9] K.S.A. 44-510e.

McLaughlin.[10] However, in *McLaughlin*, the Court noted the opinions of Dr. Tyrone Artz, an orthopedic surgeon, and Dr. George Lucas, a hand surgeon, that claimant was unable to return to the job of chuck bagger at Excel Corporation. The Court defined "work disability" as "that portion of the job requirements that a workman is unable to perform by reason of an injury".[11] In this instance, claimant was found to be able to perform all of the tasks associated with the job with respondent. The limitations displayed by the claimant in *McLaughlin* are not present in this case. Thus, claimant has no "work disability" upon which to base an award.

Additionally, the ALJ found that claimant had suffered an intervening injury after leaving respondent's employment. The Board agrees with this finding. Following his employment with respondent, claimant worked for National Beef after passing a pre-employment physical and denying any back problems. He testified that after a period of time working for National Beef, his back pain returned. When he requested accommodation from National Beef, it was denied and claimant terminated his employment. Additionally, the progress notes from the Health Partners Clinic from Minnesota describe physical symptoms far worse than anything found during the examinations by Dr. Stein, Dr. Brown or Dr. Carabetta. While claimant only described the employment with respondent to the Health Partners Clinic, this does not eliminate the fact that claimant discussed worsening symptoms while with National Beef, nor the significantly more serious symptoms described when he went to Health Partners Clinic in Minnesota. This record supports a finding that claimant suffered an intervening injury after leaving respondent, resulting in significantly worse symptoms in 2008 and 2009.

Claimant requests future medical treatment for the injuries suffered while working for respondent.

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[12] However, an injury produced by an intervening cause is not compensable.

The Board acknowledges that where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an intervening cause, it would not be compensable.[13]

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[10] *McLaughlin, supra*.

[11] *Id*. at 46.

[12] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[13] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

Here, the Board finds that claimant's right to ongoing medical treatment ends with the intervening injury or injuries suffered after claimant left respondent's employment. The Award of the ALJ, finding that claimant suffered no permanent impairment as the result of his employment injuries with respondent, is affirmed. Claimant is granted an award for all medical bills associated with the injuries suffered while with respondent and unauthorized medical not to exceed $500.00 if not already used.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that he suffered any permanent functional impairment or permanent partial general (work) disability as the result of injuries suffered while working for respondent. Claimant suffered an intervening injury or injuries after leaving respondent's employment and, thus, is not entitled to future medical treatment incurred after claimant's employment with National Beef.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated October 28, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth R. Foerster, Attorney for Claimant
Carolyn McCarthy, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge